No. 4070

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY (a corporation),
Petitioner,

vs.

HONORABLE EDWARD E. CUSHMAN, United States District Judge for the Western District of Washington, Southern Division.

BRIEF FOR HONORABLE EDWARD E. CUSHMAN, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

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RAYMOND W. CLIFFORD,
Assistant Attorney General of the State of Washington.

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THOMAS J. L. KENNEDY,
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FRANK M. LAMBORN, PUBLIC PRINTER

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STATEMENT.

We believe a brief restatement of the facts will assist an understanding of the issues presented upon the application for mandamus herein. The prayer is for a rule directed to the respondent, requiring him to reverse his decision upon a motion to compel defendants to answer in a proceeding pending before the respondent. The decision of the respondent sought to be changed by rule of this court is one

rested entirely upon the decision of a court of three judges, of which respondent was one, said court having been assembled under the provisions of section 266, Judicial Code. It is not pleaded that respondent took action not in accord in any respect with the decision of the three judges, and on the contrary, the petition and brief of the moving party here are confined almost entirely to an attack upon the reasoning and conclusion of the court of three judges. The decision of the court constituted as provided in section 266 was, in brief, that until the happening of certain events involving a resort to the courts of the state of Washington, and the exhaustion of the relief provided by the laws of said state, proceedings instituted by the filing of the appeal in equity which the court then had under consideration were stayed. It is therefore incorrect to say, without more, as in petitioner's brief, that Judge Cushman had refused to hear the motion to dismiss said appeal, and in case this be denied, to compel defendants to answer.

Although the opinion of the three judges specifically recites that "the question of the rates, whether fair, reasonable or confiscatory in character, has not been considered," petitioner here, by allegations and brief, seeks to bring the merits of this controversy before the court on petition for mandamus. It is clear upon authority that this can not be done, but the attempt imposes upon respondent the necessity of correcting and amplifying certain statements made. On page 3 of the brief of petitioner, certain conclu-

sions are stated with regard to the law of the state of Washington with respect to its application to the property of a public service company, which has been valued originally by the regulatory body. It is stated that "inasmuch as the company's property had been valued in 1914, the Department followed the course prescribed by the statute, as construed by the Supreme Court." In this connection, the attention of the court is called to the findings of fact and order of the regulatory body, which are a part of the record here, as a portion of Exhibit A attached to the petition. An examination of these findings of fact and order will indicate that both the original valuation, brought to date by adding net additions and betterments (the Pacific property) and an original valuation as of the date of the inquiry (the Home property) are dealt with in the findings of fact and order of the Department of Public Works of March 31, 1923; furthermore, it will appear that because of the interrelation of these properties in their operation and maintenance, that correct rate determination requires joint consideration, and solution of the issues presented to the regulatory body was impossible without such joint consideration. The court of three judges state in their opinion:

> "The rates to be established for the state must be, to a certain extent at least, interdependent. Yet it would seem that the suit in the Superior Court being brought on relation of the city of Seattle, would not, in the absence of intervention, necessarily be *res judicata* either of the

> rates throughout the state, or those of Tacoma or Spokane, yet it is clear that the Department's course in holding that the questions involved would only be satisfactorily determined after 'an investigation and study of the entire system of the Pacific Telephone and Telegraph Company in the State of Washington' was entirely proper."

It therefore follows that the merits (which have not yet been heard) of the proceeding in equity before the respondent necessarily involved both an original valuation, brought down to date with net additions and betterments, and an original valuation as of the date of the order. The character of the entire proceeding before the Department is consequently not fully disclosed by consideration alone of the property and operation of the Pacific Telephone and Telegraph Company, divorced from the property and operation of the Home Telephone and Telegraph Company.

The figures of valuation and rate of return alleged by petitioner and set forth in its brief on pages 4 and 5 thereof, depend upon certain apportionments of cost and expense (which are controverted), and are put in issue by an affidavit of E. V. Kuykendall, omitted from the record brought here by petitioner, but included as Exhibit 11 of our Return.

The statement of the case by petitioner treats the decision of the three judges as having confined the resort of the petitioner to the state courts for relief, to a certain proceeding instituted by the city of

Seattle (petitioner's brief, page 8). The language of the decision indicates that the relief in the state courts is not so restricted, and is as follows:

> "While the City of Seattle, plaintiff therein, has not secured a stay of the order attacked by plaintiffs herein, and it does not appear that the Pacific Telephone and Telegraph Company has asked for such a stay and been refused, the Superior Court and the Supreme Court of the State of Washington being vested, by section 10441, with legislative authority superior to that of the Department, this suit must be stayed until such time as plaintiffs have sought such relief from those courts under the state law. If denied a stay of the objectionable order by the State court upon such review, and if denied such stay in the Thurston County case now pending, and such denials are affirmed by the State Supreme Court, the applications herein for a preliminary injunction may be renewed."

The statement of the case as made by the petitioner must be supplemented by bringing to the Court's attention the existence of an appeal, as affirmatively alleged in our Return herein. This appeal was taken July 16, 1923. It fully appears from the Exhibits numbered 1 to 7, attached hereto and made a part of our Return herein, that this appeal takes up for review by the Supreme Court of the United States the opinion and order of the three judges.

Solicitors for respondent herein appear by reason of a telegram and two letters attached to and made a part of our Return, and designated as "Exhibits 8, 9 and 10."

ARGUMENT.

(A) The Demurrer Should Be Sustained.

The respondent has demurred to the petition herein upon the grounds that this court has no jurisdiction of respondent or of the subject matter of this action and that the petition does not state facts sufficient to constitute a cause of action. In support of this demurrer the following argument is respectfully urged.

The writ of mandamus is a high prerogative writ which will only be issued when the necessity therefor is made clearly to appear to this court, and before the petitioner herein is entitled to such writ, it must fully satisfy this court as to the following conditions:

1. That the respondent herein has failed and refused to perform an act which it was his duty to perform and which the petitioner was entitled to have performed.

2. That the petitioner has no other remedy.

3. That the writ of mandamus is not being sought as a substitute for an appeal or writ of error.

4. That the issuance of the writ is necessary and auxiliary to the appellate jurisdiction of this court.

5. That the writ, if issued, will afford the relief sought.

These several points will be discussed in their respective order.

I.

The Respondent Herein Has Not Failed or Refused to Perform Any Judicial Act Which It was Incumbent Upon Him to Perform.

This is a proceeding to obtain a writ of mandamus directed against the respondent as judge of the District Court of the Western District of Washington, Southern Division, to require him to set aside and vacate a certain order of July 9, 1923, and to hear and determine a motion to dismiss, filed by the Department of Public Works of the State of Washington as defendants in a certain action pending before respondent, in which the petitioner herein is plaintiff, and in the event said motion to dismiss is denied, to require the said defendants to file an answer to the bill of complaint in that suit. This proceeding can have nothing to do with the merits of that suit, but the proceedings heretofore had in that suit must at all times be borne in mind in discussing the right to a writ of mandamus herein. In that suit, the relief sought by the petitioner was of such a nature as to bring it within the provisions of section 266 of the Judicial Code and the application of the petitioner for a preliminary injunction was accordingly heard before the special tribunal of three judges, one of whom was a member of this court and one the respondent herein. Respondent having been a member of this special tribunal, is fully cognizant of the con-

clusions reached by such three judge court and the reasons therefor. This three judge court on April 30 entered an order dissolving the restraining order theretofore made and denying an interlocutory injunction. On May 23, 1923, this three judge court filed their decision, which decision is set forth in full in the petition herein. Particular attention is called to the following statements in that decision:

> "Considerations of 'comity and convenience' require the court to hold that, until plaintiffs have exhausted their right to relief in the superior and supreme courts—relief, in part at least, legislative in character, these causes must be stayed." (Petitioner's Exhibit "B," Page 17 of Decision)
>
> "The Pacific Telephone & Telegraph Company is made a defendant in the Thurston County case. While the City of Seattle, plaintiff therein, has not secured a stay of the order attacked by plaintiffs herein, and it does not appear that the Pacific Telephone and Telegraph Company has asked for such a stay and been refused, the Superior Court and the Supreme Court of the State of Washington being vested, by section 10441, with legislative authority superior to that of the Department, this suit must be stayed until such time as plaintiffs have sought such relief from those courts under the state law. If denied a stay of the objectionable order by the State court upon such review, and if denied such stay in the Thurston County case now pending, and such denials are affirmed by the State Supreme Court, the applications herein for a preliminary injunction may be renewed." (Petitioner's Exhibit "B," Page 19 of Decision)

Petitioner, throughout its brief filed herein, bases its statements of prospective relief entirely upon the Seattle case, which is evidently an attempt to confine the relief within too narrow limits, as we will more particularly show hereafter.

From this, it is apparent that the three judge court had reached the conclusion that the petitioner herein had not exhausted its state remedies and that further proceedings must be stayed until such remedies had been exhausted and relief obtained through the state courts or refused by the state courts, in which event petitioner might again apply to the District Court.

Counsel for petitioner contend that the sole power of the three judges was to pass upon the interlocutory injunction, and that the reasons which influenced them in denying such injunction can have no influence on the District Court. We cannot agree with this contention. The three judges determined that upon the broad ground of comity and convenience the Federal Courts will not entertain an application for relief until state remedies have been exhausted. We believe that this conclusion is binding upon the district court. Certainly, if reasons of comity and convenience caused the three judges to deny an interlocutory injunction, the same reasons must apply with equal or greater force upon the District Court. Thus it would seem ridiculous to say that petitioner could not obtain a relief from the three judges because it had not exhausted its state remedies, and yet could ignore the decision of the three judges, decline to

attempt to secure state remedy and proceed as though nothing had heretofore happened to obtain relief in the District Court. We submit that the same reasons which induced the decision of the three judges must control the District Court and that court is without jurisdiction to entertain further proceedings in that suit until the petitioner herein has complied with the requirement of the three judges that they seek state relief, or has obtained a reversal of the decision of the three judges by an appeal to the Supreme Court of the United States.

If it was not within the jurisdiction of the District Court to take further proceedings in that suit, it is not within the power of this court to mandamus respondent to take such action.

And even though it might be held within the jurisdiction of the respondent, it was certainly within the sound judicial discretion of the respondent as to whether or not such proceedings should be taken, and the respondent has exercised his judicial discretion and has found, as stated in the order of July 9, 1923, that the "court declines to pass upon defendant's motion to dismiss, said rulings being based upon the reasons stated in the opinion filed herein on May 23, 1923.

That we are correct in our contention that the District Court, after the order of the three judges denying the interlocutory injunction and the decision requiring that proceedings be stayed, the District Court

had no jurisdiction to proceed further in the matter, is fully sustained by the recent decision of the Supreme Court of the United States in the case of *Cumberland Telephone and Telegraph Co. v. Louisiana Public Service Commission,* decided November 20, 1922, U. S. Supreme Court Advance Opinions, 1922-23, page 96; 43 Supreme Court, 75. That case was decided on a motion by the public service commission to set aside a supersedeas and injunction granted by the District Court after the decision by the three judges. After reviewing the purpose of section 266, Judicial Code, the Supreme Court, in the opinion rendered by Mr. Chief Justice Taft, used the following language, which we consider determinative of the question:

> "This court had occasion to consider the purport and significance of section 17 of the Act of June 18, 1910, embodied in section 266 in Ex parte Metropolitan Water Co. 220 U. S. 539, 55 L. ed. 575, 31 Sup. Ct. Rep. 600, and there held that after a district judge had granted a preliminary restraining order in such a case as provided, the same judge could not set aside his own order, and such act by him was without jurisdiction. This court, therefore, issued a mandamus directing him to annul the order of vacation. We are of opinion that a single judge has no power, in view of section 266, to affect the operation of the order of the court constituted by the three judges, granting or denying the interlocutory injunction applied for. To hold that he may grant a temporary injunction varying the order of the three judges would be to make the legislation a nullity, and work the result which Congress was at great pains to avoid. Arguments to show that the order only

> continued the status quo, that a disturbance of it will work irreparable injury, and that the bond herein required secures all parties in interest, are beside the point. This is a question of statutory power and jurisdiction,—not one of judicial discretion or equitable consideration."

The Cumberland case was cited by the District Court of Florida in the case of *Jacksonville Gas Co. v. City of Jacksonville,* 286 Fed. 404, 408 as follows:

> "In Cumberland Telephone Co. v. Public Service Commission of Louisiana, 258 U. S. —, 43 Sup. Ct. 75, 67 L. Ed. —, decided by the Supreme Court of the United States November 20, 1922, it was held that the three judges constituting such tribunal as this were vested with the discretion, upon the denial of the interlocutory injunction, to withhold or grant a stay order or supersedeas. Application has been made in this case for such order in the event of denial of interlocutory injunction. Exercising the discretion vested in us, we are of opinion that under all the facts and circumstances it should not be granted."

Special attention is called to the decision of the *three judges* in the case of Boston & M. R. R. v. Niles, 218 Fed. 944. Following the Prentis case they decided the state remedies should first be exhausted and concluded the opinion with the following language:

> "We are disposed to adopt the course suggested by Mr. Justice Holmes, and *hold this proceeding in abeyance pending results in the state courts;* and it is so ordered."

This principle that the courts will not attempt by mandamus to require the lower court to do what is not within its jurisdiction to do, or attempt to control the judicial discretion of the lower court is too elemental to require citation.

II.

Petitioner Has Other Remedies and is Therefore Not Entitled to Mandamus.

The Supreme Court of the United States has repeatedly ruled that mandamus will only be issued where there is no other appropriate relief, and that it will not be issued where there is any other adequate remedy. *U. S. v. Addison,* 22 How. 174, 16 L. ed. 304; *Ex parte Newman,* 14 Wall, 152, 20 L. ed. 877, and other cases cited in 5 Fed. Stat. Ann., 2nd Edition 935. In the suit pending in the district court involved in this proceeding, it is evident from the decision of the three judges that petitioner at all times had and still has two other remedies. In the first place, it could have complied with the requirement of the three judges and applied to the state superior court and the Supreme Court for the relief sought, and in the event of failure to obtain such relief, could have gone back to the Federal Court with a showing that such relief was not available. Or, on the other hand, the statute expressly provides for an appeal direct to the Supreme Court of the United States, and this relief has at all times been open to petitioner, and until either or both of such remedies have been exhausted by petitioner, it has no right to appear before this court and seek relief by mandamus to compel the district court to proceed with the hearing in the face of the decision of the three judges and petitioner's refusal to abide thereby.

As an excuse for petitioner's failure to apply to the state courts, elaborate argument is submitted in the brief of petitioner filed herein to show that the time has expired within which relief could be obtained through the state courts, and that in any event the state courts have no power to afford such relief. As to the second phase, we do not believe that this court can devote any attention to the suggestion that the state courts do not have power to afford relief for the reason that the three judges in their decision have indicated that the state courts apparently have such power and as the decision of the three judges cannot be reversed by this court, it is binding in this proceeding until such time as it might be reversed or modified by the Supreme Court of the United States.

As to the excuse that the petitioner has negligently permitted the statutory time within which application should have been made to the state court to expire, we will say that the Supreme Court of the State of Washington has never passed upon the question of whether or not the thirty-day provision of the statute is mandatory or is a statute of limitations, and if so, if the statute might be tolled by timely proceedings in the Federal Court. Until such time as the supreme court has established such ruling, counsel for petitioner cannot authoritatively state that it cannot seek relief in the state courts, but should make a *bona fide* attempt to secure such relief, and its inability to secure it by reason of lapse of time might then be urged on a renewed application to the dis-

trict court. In this connection alone, we call the court's attention to the case of *Palermo Land & Water Co. v. Railway Commission,* 227 Federal 708, and is not cited to support the contention that a petition for rehearing must be applied for before Federal jurisdiction may be invoked. In that case, which was also a rate case, the California statute provided for an application for rehearing before the State Commission and within a certain time. The water company had neglected to make such application for rehearing, and had sought relief in the Federal Court. With reference to the time feature, the district court said:

> "In this case, however, the Commission has expressly declared at the bar and in its brief its readiness to entertain an application for a rehearing of the present order, notwithstanding the lapse of the usual time given for the purpose, and has intimated its readiness to suspend the effect of the order until such petition can be passed upon. Should such application be made, and relief denied for any reason, plaintiff will then be in a position to seek a judicial review of the order; but the present bill must, for the reasons indicated, be regarded as premature."

Landon v. Court of Industrial Relations, 269 Fed. 411. This case involved enforcement of certain gas rates involving a certain Kansas statute which required that action to question such rates must be commenced within thirty days. The court stated at page 415:

> "As to the 30-day period provided in the Kansas statute above cited, it is sufficient to say that the provision in question has been held by

the Supreme Court of Kansas not to be a statute of limitation. Aetna Ins. Co. v. Lewis, 92 Kan. 1012, 142 Pac. 954. See, also, Emporia Telephone Co. v. Public Utilities Commission, 97 Kan. 139, 154 Pac. 262. And even if said provision were in the nature of a statute of limitation, nevertheless a court of equity might still entertain a suit of this character even after the statutory period. Emporia Case, supra. See, also, Prentiss v. Atlantic Coast Line, 211 U. S. 210, 232, 29 Sup. Ct. 67, 53 L. Ed. 150."

Air-Way Electric Appliance Corporation v. Archer, 279 Fed. 878, involving certain tax statutes of the state of Ohio. The remarks of the court at page 891 are pertinent to this discussion:

"The provisions of the Ohio statute differ in various respects, which need not be detailed, from those of the Virginia Constitution and act under consideration in Prentis v. Atlantic Coast Line, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150: but the rule of comity there observed and the mode of procedure there adopted should, as far as practicable, control here. Whether the action of the plaintiff, after it was notified of the assessment made against it, rose to the dignity of a request or demand for a rehearing before the tax commission, and whether that body, if a request for a rehearing yet be made, will conclude that the request is not timely, or, out of a desire to be accurate and just, will grant a rehearing, regardless of the lapse of time, are questions for the commission to decide. In Palermo Land & Water Co. v. Railroad Commission (D. C.) 227 Fed. 708, the defendant in open court offered to entertain an application for a rehearing, although the usual time for applying therefor had expired. In the instant case the defendants have stipulated that the plaintiff's present status, during the pendency of this case and until its deci-

> sion, shall be maintained, and that plaintiff shall not be subject to any penalties, fines, or forfeitures by reason of any default on its part in the payment of the tax charged against it. Being thus amply protected, the court need not at this time trouble itself over the question of injunctive relief or render final decision. Pending an application for review before the tax commission and the disposition of the same, the present bill will be retained to await the result of such proceedings. When the conclusion reached is properly presented to the court, it will take such final action as it deems proper."

These three cases are, we think, in point, and it is quite possible that upon a proper effort being made by petitioner to seek relief in the state courts, equally liberal interpretation of the Washington statutes might be secured.

Section 10441, Rem. Comp. Stat., provides in part as follows:

> "Any company affected by the findings, or any of them, believing such findings, or any of them, to be contrary to law or the evidence introduced, or that such findings are unfair, unwarranted or unjust, may institute proceedings in the superior court of the state of Washington in the county in which said hearing has been held, or, if held in more than one county, then in the county in which said hearing was commenced, and have such findings reviewed, and their correctness, reasonableness and lawfulness inquired into and determined. Such review shall be heard by the court without the intervention of a jury and shall be heard upon the evidence and exhibits taken before the commission and certified to by it; and the court before which such hearing is had, in case it finds any such findings so sought

to be reviewed unjust, incorrect, unreasonable, unlawful or not supported by the evidence, shall make new and correct findings to take the place of such as may not be sustained, unless such findings are set aside and reversed for error on the part of the commission in rejecting evidence properly proffered in which case it shall remand said hearing to the commission with instructions to receive the evidence so proffered and rejected and make the findings of fact on the evidence so proffered and that already received.

"Said public service company or the commission shall have the right to appeal from the decision of the superior court to the supreme court of the state of Washington, as in civil cases. In case the supreme court finds any findings so sought to be reviewed unjust, incorrect, unlawful or unreasonable, or not supported by the evidence, it shall either make and render proper findings or remand the case to the superior court with instructions to make proper findings on the evidence already submitted, unless the same is reversed for error in rejecting evidence properly proffered in which case the hearing shall be remanded to the commission with instructions to receive the evidence so proffered and make findings on the evidence so proffered and rejected and that already received."

This was the statute under which the original proceeding before the department of public works was held, according to the opinion of the three judges, and it will be noted that there is no statute of limitations fixing the time when the appeal must be taken, but states that the appeal must be taken as in civil actions which would be ninety days, *State ex rel. Lowry v. Superior Court*, 41 Wash. 450, so that petitioner would still have the right of appeal.

It is evident, therefore, that petitioner has made no attempt to avail itself of its state remedy, but having such remedy, as well as the remedy by appeal, it is not entitled to a writ of mandamus from this court.

III.

The Writ of Mandamus Cannot Be Used as a Substitute for an Appeal or Writ of Error.

It has been repeatedly announced by the Supreme Court of the United States and by Federal state courts that the writ of mandamus cannot be used as a substitute for an appeal on writ of error. *Re Rice,* 155 U. S. 396, 39 L. Ed. 198; *Re Parsons,* 150 U. S. 150, 37 L. Ed. 1034; *Ex parte Harding,* 219 U. S. 363, 55 L. Ed. 252; *Morrison v. District Court of the United States,* 147 U. S. 14, 37 L. Ed. 60.

We believe a candid examination of the brief filed by petitioner herein will show that the real purpose of this proceeding is to obtain a review by this court of the order of the three judges. The major portion of the brief is devoted to a consideration of the merits of the controversy and to a showing of error in the decision of the three judges as to the state remedy available. In fact counsel for petitioner stated in court that the motion to compel defendants to answer was in reality a petition for rehearing. The statute provides for an appeal from the decision of the three judges to the Supreme Court of the United States, and such appeal is exclusive. *Jackson v. Cravens,* 238 Fed. 117. If petitioner is dissatisfied with that

decision, it must obtain a review of the same by the Supreme Court of the United States, and not by application to this court for a writ of mandamus.

IV.

The Writ of Mandamus Is Not Necessary in This Instance for the Appellate Jurisdiction of This Court.

The jurisdiction of this court is appellate only and it can issue extraordinary writs only when necessary for the exercise of its appellate jurisdiction. The courts have recognized that if the action of the lower court is such as to prevent the case from ever reaching this court on appeal, such action may be prevented by writs of mandamus or prohibition, but before this court can issue such writs it must clearly appear that its appellate jurisdiction is so threatened. Thus, in the case of *In Re Garrosi,* 229 Fed. 363, the writ was denied where the court held that the proceeding in the district court was advancing in due course and would ultimately ripen into a judgment from which an appeal would lie to the Circuit Court of Appeals. *Muir v. Chatfield,* 255 Fed. 24.

The cases along this line were reviewed by this court in its decision in *Hammond Lumber Co. v. United States District Court,* 240 Fed. 924.

It is evident that the order of July 9, 1923, made by respondent herein will not defeat the ultimate appeal to this court. The order of the respondent complained of herein is to the effect that respondent

would not pass upon the motion to dismiss until the conditions required by the order of the three judges had been fulfilled. As stated above, it has been at all times within the power of the petitioner herein to comply with such decision of the three judges or appeal therefrom to the Supreme Court of the United States. In other words, the order of the respondent simply stays proceedings until the same have been expedited by the petitioner herein. The petitioner having failed to take steps to expedite the hearing of the case on the merits, is in no position to allege that the jurisdiction of this court is being threatened by the stay of proceedings in the district court. It must be presumed that whenever petitioner can show to the district court that it has complied with the decision of the three judges, or that it has obtained a reversal of the decision of the three judges by the Supreme Court of the United States, then the district court will proceed with the suit pending before it, and until such showing has been made to the district court this court is without authority to issue a writ of mandamus for the reason that the same is not necessary to the exercise of its appellate jurisdiction.

V.

The Writ, if Issued, Will Not Afford Relief to Petitioner.

Where the writ of mandamus would be unavailing to aid the party seeking such relief, it will not be granted. *United States v. Norfolk, etc., R. R. Co.,* 118 Fed. 554; *In Re Welch Mfg. Co.,* 201 Fed. 519.

If the writ applied for should be granted, the respondent would be required to pass upon defendant's motion to dismiss. As this court could not direct the manner in which respondent should dispose of that motion, a showing made before the respondent might justify, in his judicial discretion, the granting of the motion, in which case, petitioner's bill would be dismissed. From this final order it is true an appeal would lie to this court, but the relief available to the petitioner on such appeal would be no greater than can now be obtained by petitioner on an appeal from the order of the three judges direct to the Supreme Court of the United States. On the other hand, if respondent should see fit to deny the motion to dismiss and require the defendants to answer, it is evident that so long as the decision of the three judges stands, respondent would still, if he has jurisdiction, be entitled in the exercise of judicial discretion to stay proceedings until the state remedies had been exhausted or the decision of the three judges reversed by the Supreme Court of the United States. It would be an idle and useless matter for the District Court

to proceed further with this case when the result of such proceeding might at any time be rendered unavailing by the decision of the Supreme Court of the United States, and it is therefore submitted that any relief afforded by the writ of mandamus would be of such uncertain and temporary nature as not to justify the issuance of that extraordinary writ.

Counsel for petitioner in support of their right to writ of mandamus, have cited the case of *McClellan v. Carland,* 217 U. S. 268, 54 L. Ed. 762, and other cases. These cases are all, we believe, easily distinguishable from the facts involved in the case at bar. Those cases involve ordinary concurrent jurisdiction of the state and Federal courts, and do not involve proceedings under section 266 of the judicial code wherein the constitutionality of a state statute or order of an administrative board under such state statutes is essential to Federal jurisdiction. Proceedings under section 266 are of so important a nature that the Federal courts have included them under the rule of "comity and convenience" asserted in the case of *Prentis v. Atlantic Coast Line,* 211 U. S. 210. The respect accorded proceedings in the state courts in such cases is well set forth in the case of *Boston & M. RR. v. Niles,* 218 Fed. 944, 946.

> "While this reasoning applies to litigation in a broad sense and to general rights, it has especial force in cases which involve the validity of a state statute which has not been passed upon by the state courts, and where the Federal courts are invoked to pass in the first instance upon the

> question whether it is in conflict with the spirit of either the Federal or a state Constitution. In respect to such situations, the Supreme Court has set forth over and over again that, except in extreme and exceptional cases, the state court is the appropriate court to have the first opportunity to determine whether its statutes are good or bad in a constitutional sense. And, moreover, where state statutes relate to general rights, unless they conflict with the provisions of the Federal Constitution, it has been repeatedly said that the state court's interpretation or construction will generally be accepted as final, and would only be departed from, if at all, with reluctance."

This importance was fully recognized by the decision of the three judges, and will no doubt be equally observed by this court, and it is therefore incumbent with special force upon the petitioner to come to this court with a clear showing of a right to the writ sought, and it is submitted that an examination of the petition herein filed will indicate that the petitioner has not shown any right to the writ sought.

A considerable portion of petitioner's brief is devoted to an effort to show that the rule laid down in the case of *Prentis v. Atlantic Coast Line,* 211 U. S. 210, is not applicable to their suit in the district court. Unfortunately for petitioner, this argument failed to convince the three judges or the district court. We submit that while it would be a pertinent argument in support of petitioner's appeal to the Supreme Court of the United States, it is out of place in this argument relative to the issuance of a writ of mandamus. The three judges have passed

upon that question and determined adversely to petitioner. This court cannot now review the action of the three judges, and their decision on this question is the law of the case unless reversed by the Supreme Court of the United States.

In support of this contention, counsel place great reliance on the recent decisions of the Supreme Court of the United States in the cases of Oklahoma Natural Gas Co. v. Russell, United States Advance Opinions, 1922-23, page 395, and Prendergast v. New York Telephone Co., 43 Supreme Court, 466. These cases are easily distinguishable from petitioner's case in the district court. In the Oklahoma case the Oklahoma Natural Gas Co. had applied to the Corporation Commission of Oklahoma for higher rates. The application was denied. The Oklahoma statute, which is admitted to be similar to the Virginia statute covered by the Prentis case, permitted an appeal from the commission to the Supreme Court. The gas company took such appeal and applied for a supersedeas. A supersedeas was denied, and while the appeal was pending before the state supreme court, the gas company applied to the Federal court for relief. It will be noted that it had first sought a stay of the order in the state courts and been denied. Its position is, therefore, the same as the position of petitioner would be if it were to comply with the requirements of the three judge decision, seek a stay in the state courts and be denied and then renew its application in the district court for preliminary in-

junction. Until it has done this, it can claim no benefit from the Oklahoma case.

Petitioner's failure on any of the five grounds alleged above to show cause for issuing the writ is, we contend, fatal to their case, and we respectfully submit that petitioner has failed on all five counts.

(B) The District Court and This Court Have No Jurisdiction by Virtue of the Appeal to the Supreme Court of the United States.

This portion of our brief will be devoted principally to a discussion of the legal effect of the matters pleaded, including the appeal taken to the Supreme Court of the United States. So far as we have been able to discover, petitioner in its pleadings and brief here has completely ignored the existence of this appeal. The appeal was taken July 16, 1923, and the petition for mandamus was filed and order to show cause issued herein on or about August 2d, 1923. The præcipe for record on appeal to the Supreme Court of the United States includes the record as made, which resulted in the order of April 30, 1923, denying interlocutory injunction, and the opinion of the three judges filed May 23, 1923, on application for interlocutory injunction, pursuant to the order of April 30, 1923, and both said order and opinion are made a part of the record on appeal. The assignment of errors on appeal indicates that appellant there (petitioner here) has taken to the Supreme Court of the United States the identical issues presented by this

application for mandamus. A comparison of the petition herein and the assignment of errors on appeal attached to our Return herein establishes this. The petition recites the entry of the order of the three judges on April 30, 1923, and the opinion filed pursuant thereto, and attaches a copy of both to the petition and makes them parts thereof. The petition further recites the entry by respondent here of an order on July 9, 1923, and a copy of said order is attached to and made a part of the petition herein. A portion of this order last mentioned is as follows:

> "It is now ordered that said motion to require the defendants to answer be, and the same is hereby denied, and the court declines to pass upon defendants' motion to dismiss, said rulings being based upon the reasons stated in the opinion filed herein on May 23, 1923."

That the issues presented on the appeal to the Supreme Court of the United States, and those involved in this application for mandamus, are the same, is put beyond the shadow of a doubt, by the affirmative matters alleged in our return, the petition filed herein, and finally, by petitioner's own brief on this application.

Appeal Suspends Jurisdiction of Lower Court.

Since the taking of the appeal on July 16, 1923, the respondent herein has been without power in the premises. It is well settled law that as soon as an appeal is taken, the jurisdiction of the appellate court attaches, and that of the trial court ceases.

Keyser v. Farr, 105 U. S. 265; *Kendrick v. Roberts,* 214 Fed. 268. Moreover, this long-established rule is of particular application in this case, because of the appeal direct to the Supreme Court of the United States under the provisions of section 266, Judicial Code, which petitioner herein has already employed. Petitioner cannot, in this proceeding, and by the device of the application for mandamus, appeal from the order of the three judges of April 30, 1923, or in this proceeding accomplish what amounts to the same thing, i. e., compel respondent to reverse his order of July 9, 1923 (expressly based upon the ruling of the three judges), which respondent cannot now do, without overruling the decision of the court of which he was a member, and further, because he is now without jurisdiction of the cause. The case of *Jackson v. Cravens,* 238 Fed. 118, is directly in point, and we quote the facts and the law from the same as follows:

> "This cause was submitted upon the motion of the appellees to dismiss the appeal. The order appealed from was an order of the District Court for the Southern District of Florida, denying an interlocutory injunction applied for by the plaintiffs. The bill was filed to restrain the supervising inspector of naval stores for the state of Florida from taking steps to enforce an alleged unconstitutional statute of that state. As provided by section 266 of the Judicial Code, the District Judge, upon presentation of the application for a temporary injunction, called to his assistance a Circuit Judge and another District Judge, before whom the application was

heard, and by whom it was denied. Thereupon the plaintiffs took an appeal from the order of the District Court, composed of the three judges, to this court. Section 266 provides that:

"'An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case.'

"The contention of the plaintiffs (appellants) is that this provision is permissive only, and does not provide an exclusive remedy for an appeal, but that resort may be had, at the election of the plaintiffs, to the remedy provided in section 129 of the Judicial Code by appeal to this court. The defendants (appellees) contend that the appellate remedy provided by section 266 is exclusive.

* * * * *

"We think Congress thereby intended to fully cover the subject-matter of appeals from such orders, and that the remedy so provided was exclusive, not cumulative. The rule was laid down by the Supreme Court in the cases of Brown v. United States, 171 U. S. 631, 19 Sup. Ct. 56, 43 L. Ed. 312, and Lauren Oil Co. v. Morrison, 212 U. S. 291, 29 Sup. Ct. 394, 53 L. Ed. 517, that:

"'Where a statute provides for an appeal or a writ of error to a specific court, it must be regarded as a repeal of any previous statute providing for an appeal or a writ of error to another court.'

"We think the practical objects to be accomplished are better subserved by the construction we have given the section. In matters where the constitutionality of a state statute is involved, the desiderata are a speedy final decision of the question and the maintenance of the statu quo, as far as may be, pending its decision. The former is the more important. The latter is pro-

vided for by section 266, through the means of a hearing of the application for an interlocutory injunction by an 'enlarged tribunal' different from the court of equity mentioned in section 129. The former is accomplished by providing for a direct appeal to the Supreme Court from the order granted on the hearing of the application for the interlocutory injunction. An appeal to an intermediate appellate court would serve to delay the final and authoritative decision of the question. The decision of the interlocutory appeal in a large majority of cases of this character is determinative of the question as to the constitutionality of the state statute, if rendered by a court of last resort. To expedite a final settlement of the constitutionality of the state statute, a direct appeal to the Supreme Court provides the quickest method. The Supreme Court has the authority to advance the hearing when justice demands it. The importance of a speedy final settlement of the question is not confined to the litigants before the court, and their interests are not alone concerned. The state and its citizens are also concerned, and this makes a speedy and authoritative settlement of the question of more importance even than the preservation of the status in the instant case. Giving to the litigants the election to delay such authoritative decision by an appeal to an intermediate court would defeat this purpose.

"Because of the views expressed, we are constrained to hold that the appeal provided by section 266, direct to the Supreme Court, is exclusive, and that the appeal to this court should be dismissed, at appellants' costs; and it is so ordered."

In the order of the three judges filed on April 30, 1923, dissolving the temporary restraining order and

denying the application for an interlocutory injunction, it was stated that an opinion would be filed later. From an examination of the opinion it will be clearly noted that the right of the plaintiff to a temporary injunction on the merits was not passed on, nor considered by the court, as the action was stayed as a matter of law prior to the time that the merits might be considered, because the legislative machinery of the state had not been exhausted. An appeal was taken from the order of the three judges directly to the Supreme Court of the United States and obviously the only issue that could be raised upon that appeal was an issue of law, namely, whether the action should be stayed prior to the time that the legislative machinery of the state was exhausted. It could not raise the question of whether the plaintiff was entitled to a temporary injunction on the merits because such question was not passed on by the three judges. In this case, this court is asked to compel the respondent, Honorable Edward E. Cushman, to rule on defendants' motion to dismiss, and if such motion is denied, to compel defendants to answer in the original action instituted in the district court. Before this court can grant the relief prayed for in this action it must pass on the question of law decided by the three judges as to whether this action should be stayed until the plaintiff in the original action had exhausted its remedies in the state courts. It is therefore obvious that the petitioner herein has taken two appeals, one to the Supreme Court of the United

States, and one to the circuit court of appeals, involving only one issue of law, namely, whether the action should be stayed until the legislative machinery of the state had been exhausted. A different situation would be presented if the three judges had considered the application for a temporary injunction on the merits. If the relief prayed for in this case were granted, a situation like this might arise. Assume that this court granted the relief prayed for in this action and the district court overruled defendants' motion to dismiss in the original action, compelled defendants to answer, and proceeded with the trial on the merits, and assume that in the appeal to the Supreme Court of the United States the decision of the three judges was affirmed to the effect that the action should be stayed until the legislative machinery of the state had been exhausted, then the trial of the district court on the merits would be for naught.

(C) Answer to Petitioner's Arguments.

The remaining portion of this brief will be directed to answering arguments made in petitioner's brief.

It is first contended that respondent did not necessarily have to overrule the decision of the three judges in order to grant the motion of petitioners to make the members of the department of public works answer in the original action instituted in the district court. But we believe that the contrary is true. From an examination of the decision of the three

judges filed on May 23rd, it clearly appears that the application for an interlocutory injunction was not passed on by the three judges on the merits. In fact, this application was not in any manner considered on the merits by the three judges. It was held as a matter of law by the three judges that the action in the district court was prematurely instituted, for the reason that the plaintiffs in that action had not exhausted the legislative machinery of the state and that such action must be stayed in the district court until such state machinery had been exhausted. There is no showing that petitioners attempted in any manner to exhaust the legislative machinery of the state, and it is therefore obvious that the respondent could not grant petitioner's motion to compel the department of public works to answer in the action in the district court, or compel respondent to rule on the motion to dismiss without overruling the opinion of the three judges. The three judges stated in the opinion that the action in the district court should be stayed until petitioners had performed certain conditions precedent. These conditions were not performed and obviously respondent could not proceed with the case without overruling that decision.

It is next contended by the petitioner that it would be futile for it to ask for a stay because the state law, section 10429, Rem. Comp. Stat., expressly prohibits a stay in an action of this character. However this may be, the three judges held that they must apply to the state courts for a stay and if the stay was de-

nied by the Supreme Court of the state, then they might apply for an interlocutory injunction in the district court pending the final decision by the Supreme Court. It would have been a very easy matter for the petitioner to have complied with the decision of the three judges and asked for a stay, and then if such stay had been denied, they would have been entitled to invoke the jurisdiction of the Federal court under the decision of the three judges. The fact that the statute might prohibit a stay of this character does not relieve them of the duty to apply for such a stay. In the first instance, it is for the state courts to construe this statute, and in the second instance, it might properly be that the state Supreme Court would hold such statute unconstitutional, or for other reasons permit a stay. They must at least apply for a stay and if the Supreme Court of the state denied it under the statute just referred to, then federal jurisdiction might be invoked.

It is also maintained that a stay of the enforcement of the order would grant no relief to petitioner for the reason that the stay would but keep the confiscatory order in effect. It is submitted, however, that a stay of the order of the department of public works refusing to grant petitioners the raise in rates asked for in the tariff filed with the department of public works would not keep in effect the confiscatory order of the department of public works appealed from, but would put in effect the rates prescribed in the

tariff filed by the petitioner with the department of public works.

It is next contended that if the decision of the three judges is correct, and the courts of the state of Washington are vested with legislative power in appeals from the department of public works, that such a statute is unconstitutional in that legislative powers cannot be lawfully delegated to courts. It is submitted, however, that the power of courts to substitute their findings on valuation for the findings of the department of public works, section 10441, Rem. Comp. Stat., is quasi legislative in its nature, and that such a delegation is not unconstitutional. It is also submitted that the question of whether or not such a statute is unconstitutional as violating one of the provisions of the state constitution is solely a question for the state court to determine and that such a contention should be first raised in the courts of the state. In fact, the Supreme Court of this state has had occasion to pass on this statute, and has assumed that such statute is constitutional and has never declared it unconstitutional. *Everett v. Department of Public Works,* Vol. 25, Wash. Dec. 7, p. 357.

Petitioner's next contention, that the time for appeal has elapsed, has already been answered in this brief from the fact that section 10441, Rem. Comp. Stat., does not prescribe a statute of limitation within which an appeal must be taken to the superior court.

It is next contended by petitioner, in view of the following language found in the case of *Prentis v. Atlantic Coast Line,* 211 U. S. 210 (232):

> "If the appeals are dismissed as brought too late, the companies will be entitled to decrees,"

that they are entitled to invoke federal jurisdiction, because the time for their appeal has expired. We have already shown that the time for their appeal had not expired at the time the opinion was filed, nor has it yet expired. In any event, it was incumbent upon the petitioner to take an appeal to the state courts and to apply for a supersedeas, and the question of whether or not their appeal was timely or they were entitled to a supersedeas, was one for the state courts to determine, as evidenced by the following language in the *Prentis* case:

> "It may be that when an appeal is taken to the supreme court of appeals, this section will be held to apply and the appeal be declared too late. We express no opinion upon the matter which is for the state tribunals to decide, but simply note a possibility."

It would also seem that this argument of petitioner is in direct conflict with the equitable maxim to the effect that

> "Equity aids the vigilant and not those who slumber on their rights."

It is submitted that the language in the *Prentis* case quoted *supra* certainly assumes that an appeal will have to be taken in any event, and then if such appeal is declared by the state court to be too late, a

decree might be had. In any event, this language is *obider dictum,* and no reasoning to support it. However, in the later case of *Public Utilities Commission of the District of Columbia v. Potomac Electric Power Company,* U. S. Sup. Ct. Adv. Ops. 1922-23, p. 512, it appeared that the utility company took an appeal from the public utilities commission which had entered an order fixing the valuation of the company's property. The appeal section provided that the appeal should be taken within one hundred and twenty days. In considering the question of whether federal jurisdiction might be invoked if the appeal were taken too late, the court said:

> "Some question has been made as to the validity of section 65, which forbids all recourse to courts to set aside, vacate, and amend the orders of the commission after one hundred and twenty days, and of section 69, which puts the burden upon the party adverse to the commission to show, by clear and satisfactory evidence, the inadequacy, unreasonableness, or unlawfulness of the order complained of. It is suggested that this deprives the public utility of its constitutional right to have the independent judgment of a court on the question of the confiscatory character of an order, and so brings the whole law within the inhibition of the case of Ohio Valley Water Co. v. Ben Avon, 253 U. S. 287, 64 L. ed. 908, 40 Sup. Ct. Rep. 527. It is enough to say that, even if sections 65 and 69 were invalid, the whole act would not fail, in view of section 92 already referred to. It will be time enough to consider the validity of those sections when it is sought to apply them to bar or limit an independent judicial proceeding raising the

question whether a rate or other requirement of the commission is confiscatory."

It will thus be seen that the court squarely refused to pass on this question which is a conclusion that the *Prentis* case is not conclusive on this point.

It is also maintained by petitioner that there is no controversy between the petitioner and the department of public works that the company's property in the state of Washington was valued by the public service commission in 1914, and that such valuation has not been reviewed, and that in determining the valuation of petitioner's property in the order filed March 31, 1923, that the value of the company's property was arrived at by taking the valuation computed in 1914 and adding the net additions and betterments made to the property subsequent to that date, and that such a method of computing value is erroneous in that the correct method of computing value is by computing the value at the time when the inquiry is made regarding rates as established by the Supreme Court of the United States in the cases of *State ex rel. Southwestern Bell Telephone Company v. Public Service Commission of Missouri,* 43 Sup. Ct. Rep. 544, and *Bluefield Water Works & Improvement Co. v. Public Service Commission of West Virginia,* 43 Sup. Ct. Rep. 675.

It is then contended that an appeal by the petitioner to the state courts would be futile because the state court would refuse to compute the value of petition-

er's property in conformity with the method announced in the United States Supreme Court in the cases cited *supra,* and that they would, under the decision of the state supreme court in *State ex rel. Spokane Gas Co. v. Kuykendall,* 119 Wash. 107, compute the value of petitioner's property by taking the value arrived at in 1914 and adding additions and betterments thereto. It will be noted that the United States Supreme Court cases cited *supra* were decided subsequent to March 31, 1923, and subsequent to the *Spokane Gas Co.* case, *supra,* and this argument is based solely on the ground that the state court will proceed to ascertain the value of petitioner's property in a manner contrary to the method which the United States Supreme Court has declared is correct. Certainly this court should not presume that the state courts will fail to follow the decisions of the Supreme Court of the United States or that they will compute valuation by a method which the United States Supreme Court has stated is incorrect.

It is next contended that even if the state courts have power to substitute their findings for the department of public works in valuation matters, which might be considered legislative in its character, that the test to be applied is that the nature of the final act determines the nature of the previous inquiry, and that the final act in this proceeding is the fixing of rates which the state courts have no power to do, and that therefore, the state courts do not exercise legislative power. It is apparent from an examina-

tion of section 10441, Rem. Comp. Stat., that the state courts do have power to substitute their findings for the findings of the department of public works on valuation matters, which is undoubtedly at least quasi legislative in its character. It is also undisputed that in the process of rate-making, the question of valuation is one of the most vital elements to be considered in determining rates. In other words, the question of valuation is so commingled with the question of the amount of the rate that they practically amount to the same thing, as rates are either made higher or lower, as the valuation of the company's property increases or decreases.

While it is true that the supreme court of this state does not have power to actually fix the amount of rates, it has power to review an order of the department of public works and to remand the proceedings to the department of public works with instructions to enter an order in compliance with the opinion, which at least indirectly gives the supreme court the power to change rates prescribed by the department of public works. In the case of *Public Service Commission, et al. v. State ex rel. Great Northern Railway Co.,* 118 Wash. 629, the court said:

> "The case is remanded to the superior court with directions to add to the judgment already made by it the idea that the whole matter is again referred to the commission in order that it may act in consonance with this opinion."

We also quote the following excerpt from the *Prentis* case, *supra*:

> "Whether their property was taken unconstitutionally depends upon the valuation of the property. The income to be derived from the proposed rate and the proportion between the two are pure matters of fact. When those are settled, the law is tolerably plain."

This shows clearly that the real issue involved is the valuation of petitioner's property and the question of whether or not they are being deprived of their property in an unconstitutional manner, depends upon the valuation of their property, the determination of which is legislative in its character. This statement is also authority to the effect that fixing value and making rates are practically the same.

In support of the rule that the legislative process of the state must be exhausted before federal jurisdiction may be invoked, the case of *Oklahoma Operating Company v. Love,* 64 L. ed. 596, is cited. In that case it appears that an action was instituted in the circuit court for the purpose of enjoining the corporation commission of the state of Oklahoma from enforcing a certain order. It also appears that under the state law, no appeal was provided to the state courts from the decision of the corporation commission. If, however, the operating company refused to comply with the order, it might be cited into court for contempt and heavy fines and penalties imposed. On appeal to the Supreme Court of the United States, it was held that the injunction might properly be granted, the inference being that if the statutes allowed an appeal to the Supreme Court of the state, it must first be

taken before federal jurisdiction could be invoked.

It is next contended that where the utility is daily suffering confiscation, it is not necessary that the legislative process be complete before a resort is had to the federal courts, and the case of *Oklahoma Natural Gas Co. v. Russell,* U. S. Adv. Ops. 1922-23, p. 395, is cited to support this contention. It is submitted that the *Russell* case is exactly to the contrary for in that case it appeared that the petitioner had applied to the highest state tribunal for a stay and had been refused. Where such a situation exists, the court holds that where the company is suffering daily, they may invoke the jurisdiction of the federal court. In this case, no resort has been made to the state courts for a stay and the case there cited is therefore inapplicable and direct authority for the position that petitioner must seek a stay in the state courts before they are entitled to invoke federal jurisdiction. This is shown clearly by the following language in the *Russell* case:

> "Coming to the principal question, if the plaintiffs respectively can make out their case, as must be assumed for present purposes, they are suffering daily from confiscation under the rate to which they are now limited. *They have done all the they can under the state law to get relief and cannot get it.*" (Italics ours.)

In the case at bar no effort whatever has ever been made to seek all or any relief in the state courts.

The case of *Prendergast v. New York Telephone Co.,* U. S. Adv. Ops. 1922-23, p. 516, is cited by peti-

tioner in support of its position. In that case it appears that the three judges allowed a temporary injunction without requiring the public service company to exhaust its remedy in the state courts. If, exercising their discretion, they had imposed this condition precedent, a different question would have arisen and would have been identical with the situation here. It also appears from that opinion under a decision of the New York state court, that the fixing of rates by the commission was the final legislative process and the courts had no legislative functions to perform as the courts of this state have in valuation matters by virtue of section 10441, Rem. Comp. Stat. nor is there any contention made to that effect.

It is next contended that inasmuch as the petitioner is a foreign corporation, it has a right to invoke the jurisdiction of the federal courts on the grounds of diversity of citizenship, or it has the right to invoke the jurisdiction of the state courts by virtue of the appeal section of the Washington statutes in taking appeals from orders of the department of public works, and that no court has power to deny them this right of election, which it is claimed was done by the district court in this case. This contention is no doubt true in so far as private litigants are concerned, but it has no application where a state, by virtue of its sovereign power, creates a commission for the purpose of regulating public utilities and provides an appeal from a decision of such com-

mission to the state courts. The case of *Oklahoma Natural Gas Co. v. Russell, supra,* is exactly in point on this question and holds squarely that where a state has created a commission and provided an appeal to the state courts, that an appeal must be taken and a stay asked for before federal jurisdiction may be invoked.

It is also contended in support of the contention that mandamus will lie in this case, that the district court has absolutely stayed the present proceeding and that it will therefore render it impossible for petitioner to ever proceed to the circuit court of appeals by appeal because of this fact, and that therefore the circuit court of appeals has the right by mandamus to compel the district court to act in order to aid its appellate jurisdiction. It is submitted, however, that the district court has not absolutely stayed the present action, but has stayed it temporarily until certain conditions precedent have been performed by petitioner, namely, to exhaust the state remedy, which is not an unreasonable condition. All that petitioner must do would be to take an appeal to the state courts and apply for a supersedeas, and if the supersedeas were denied under the decision of the three judges, it might then invoke federal jurisdiction.

As stated in the case of *American Construction Co. v. Jacksonville Railway Co.,* 148 U. S. 372 (379):

> "Least of all, can a writ of mandamus be granted to review a ruling or interlocutory or-

> der made in the progress of a cause: for, as observed by Chief Justice Marshall, to do this 'would be a plain evasion of the provision of the act of Congress that final judgments only should be brought before this court for reexamination'; would 'introduce the supervising power of this court into a cause while pending in an inferior court, and prematurely to decide it'; would allow an appeal or writ of error upon the same question to be 'repeated, to the great oppression of the parties'; and 'would subvert our whole system of jurisprudence.' "

Again, in the case of *McClellan v. Carland,* 217 U. S. 268 (281) it was said:

> "It cannot be denied that a circuit court of the United States, like other courts, had power to postpone the trial of cases for good reasons, but by the order made in this case, the federal court withheld the further exercise of its authority until the state court, by its action in a case involving all the parties, might render a judgment which would be res adjudicata and thus prevent further proceedings in the federal court."

In the instant case the action has not been absolutely stayed but only postponed for good reasons, namely, until the legislative machinery of the state has been exhausted or until a stay has been applied for and denied.

A great many cases are cited by petitioner to the effect that where both the federal and state courts have concurrent jurisdiction, an action should not be stayed in the federal court until the issues were determined in the state court, as the decision of the

state court would be res adjudicata, and the appellate jurisdiction of the circuit court of appeals would thus be defeated, and that, for this reason, the circuit court of appeals might properly issue a writ of mandamus to compel the district court to proceed in aid of its appellate jurisdiction. It is submitted, however, that while this rule may be true in case of private litigants where both the state and federal courts have concurrent jurisdiction, that it has no application to the present case where the state has created a commission for the purpose of regulating public utilities and has provided an appeal to the state courts. In the case of *Boston & M. R. R. Co. v. Niles,* 218 Fed. 944 (948), the court said:

> "We make no suggestion as to the proper remedy in case of a result adverse to the railroad before the state court or upon this phase of the case, further than to say that the petitioner would be at liberty to renew his application in the federal courts without fear of being met by a plea of res judicata."

The decision of a state court on whether or not a rate was confiscatory in violation of the fourteenth amendment to the United States Constitution would not be res adjudicata on the federal courts, in any event. The line of cases cited by petitioner are not in point, as in the present case the federal and state courts do not have concurrent jurisdiction, because in the *Oklahoma Natural Gas Co. v. Russell, supra,* the supreme court of the United States stated that

the federal courts do not have jurisdiction until a stay is asked for in the highest state tribunal.

Respectfully submitted,

JOHN H. DUNBAR,
Attorney General of the State of Washington.

RAYMOND W. CLIFFORD,
Assistant Attorney General of the State of Washington.

Solicitors for Honorable Edward E. Cushman, United States District Judge for the Western District of Washington, Southern Division.

P. C. SULLIVAN,

THOMAS J. L. KENNEDY,
Of Counsel.

No. 4070

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY (a corporation), *Petitioner,*

vs.

HONORABLE EDWARD E. CUSHMAN, United States District Judge for the Western District of Washington, Southern Division.

REPLY BRIEF OF PETITIONER

OTTO B. RUPP,

POST, RUSSELL & HIGGINS,

PILLSBURY, MADISON & SUTRO,

Solicitors for Petitioner.

W. V. TANNER,

Of Counsel.

LAW BRIEF PRINTING CO., SEATTLE, WASH.

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REPLY BRIEF OF PETITIONER

Argument

The fallacy in the argument of counsel for respondent is in the assumption that by this proceeding in mandamus we are seeking to review the *action* of the three-judge court in refusing to issue an interlocutory injunction. This court is urged to deny relief upon the theory that the opinion of the three judges is controlling. The argument rests upon a wholly false premise.

It is true that the respondent district judge based his refusal to hear and determine the motion to dis-

miss and to proceed to trial upon the merits in due course upon the reasoning of the three-judge court. But our right to invoke the aid of this court is governed by the *acts* of the district court, rather than by the reasons for those acts—by the *order* made by the district court, not by the opinion of the judge.

It is very clear that the reasoning of the three-judge court is not binding upon the district court or upon this court. Were it not for the provisions of section 266 of the Judicial Code the power to issue an interlocutory injunction would reside in the district court. That statute provides for the convening of three judges for the especial purpose of considering the application for relief *pendente lite.* As said by the Supreme Court of the United States in *Cumberland Tel. & Tel. Co. v. Louisiana Public Service Comm.*, U. S. Adv. Op. 1922-23, pp. 96, 98:

"The wording of the section leaves no doubt that Congress was by provisions ex industria seeking to make interference by *interlocutory injunction* (italics ours) from a federal court with the enforcement of state legislation regularly enacted and in course of execution, a matter of the adequate hearing and the full deliberation which the presence of three judges, one of whom should be a Circuit Justice or Judge, was likely to secure. It was to prevent the improvident granting of such injunctions by a single judge, and the possible unnecessary conflict

between federal and state authority always to be deprecated."

With the disposition of the application for an interlocutory injunction the function of the three-judge court ended. The only questions involved upon the appeal to the Supreme Court of the United States are those arising in respect to the order denying the injunction. All further proceedings arising in the prosecution and trial of the suit upon the merits are within the exclusive jurisdiction of the district court, subject to the control of this court and of the supreme court in the exercise of their respective appellate jurisdictions.

Section 266 does not create a new tribunal. Applications under that section are addressed to the district court, and all orders are then made by that court (*Jackson v. Cravens*, 238 Fed. 117, 120). The district court, composed of one judge, has *sole* jurisdiction of the *whole* action except that in passing upon the application for a temporary injunction he is required to "call to his assistance to hear and determine the application two other judges." The three judges sit as an enlarged district court for that single purpose. They have no appellate jurisdiction nor any other jurisdiction than merely to pass upon the application for an

interlocutory injunction. When that application has been heard and an order entered granting or denying the interlocutory injunction, the three-judge court has concluded its single function. The cause thereafter continues in the same district court as a one-judge court; and while the order issued by the three-judge court on the application for the preliminary injunction may go on appeal to the supreme court, the cause, for the purpose of taking evidence and determining on the merits whether a final and permanent injunction should be granted, irrespective of the disposition of the application for the temporary injunction, remains within the sole and exclusive jurisdiction of the one-judge district court. The cause, from the date of filing suit until the entry of final judgment, is at all times in the district court. Section 266 is merely a limitation on the power of a single district judge. Except as so limited his powers with reference to the cause are unrestricted.

Ex parte Metropolitan Water Co., 220 U. S. 539.

Cumberland Tel. & Tel. Co. v. Louisiana Public Service Com., U. S. Adv. Op. 1922-23, 96.

The fact that Judge Cushman based his refusal to proceed in due course upon the reasoning in the

opinion of the three judges is wholly immaterial. If the opinion is sound, Judge Cushman is right in refusing to proceed. But if the opinion is unsound, the cause should proceed to trial in the district court, irrespective of the erroneous conclusion of the three-judge court in passing upon the application for an interlocutory injunction, or the steps we have taken to correct that error. It is true that we attack the reasoning of the three-judge court. But we attack that reasoning because it is the basis of Judge Cushman's order denying our application to require that the case proceed on the merits—not in an attempt to procure an interlocutory injunction.

Respondent's whole argument is premised upon the view that the opinion of the three-judge court is binding upon the district court. Obviously, since the three-judge court convened for a special purpose, has no jurisdiction in respect to the suit on the merits, the opinion has no binding force.

The foregoing, we think, is a complete answer to the argument of counsel for respondent. The case, however, is an important one and we shall therefore examine in detail the specific points made in counsel's argument and the authorities cited.

The Respondent Has Refused to Perform a Judicial Act Incumbent Upon Him— the Trial of the Case on the Merits in Due Course

Suppose the three-judge court had based its denial of the interlocutory injunction upon the ground that the confiscation of the petitioner's property had not been clearly shown. Obviously, under such circumstances it would be the duty of the district court to hear the case on the merits and render its decision upon the pleadings and the evidence introduced. Counsel contend, however, that the opinion of the three-judge court denying the injunction upon the ground of "comity and convenience" because the petitioner has not exhausted its state remedies precludes further action by the district court until the petitioner shall have complied with the requirements set forth in the opinion. Counsel say (p. 11) :

"The three judges determined that upon the broad ground of comity and convenience the federal courts will not entertain an application for relief until state remedies have been exhausted. *We believe that this conclusion is binding upon the district court.*"

As we have pointed out, it is the acts of the three-judge court—not its opinions—that are binding upon the district court. This is illustrated by the case of *Cumberland Telephone & Telegraph Co. v. Louisana Public Service Commission*, U. S. Adv. Op. 1922-23, p. 96, cited in respondent's brief. It was there held that where the three-judge court had declined to issue an interlocutory injunction, the district court could not in effect perform that act by granting a stay pending an appeal. The power of the district court to proceed with the cause on the merits was not involved. This decision holds that the district judge cannot do an *act* inconsistent with the *act* of the three-judge court. He cannot grant an injunction after the three-judge court has denied one, and he cannot dissolve an injuction after the three-judge court has granted one. But the decision does not prevent the district judge from doing an act that is consistent with the act, although perhaps contrary to the reasoning, of the three-judge court. Proceeding with the cause on the merits and taking testimony to determine whether a final and permanent injunction should be entered is the next step after the denial of the interlocutory injunction, and perfectly consistent with it.

Nor is the case of *Jacksonville Gas. Co. v. City of Jacksonville* 286 Fed. 404, cited by respondent, in point here. The only question involved in that case was the right to an appeal from the three-judge court to the Circuit Court of Appeals, which it was held would not lie in view of the specific provision of §266 of the Judicial Code, giving the right of appeal to the Supreme Court of the United States.

The case of *Boston & Maine R. R. Co., v. Niles*, 218 Fed. 944, also cited by respondent, is manifestly unsound. The case was decided before the decision of the United States Supreme Court in *Detroit etc. Co. v. Commission*, 235 U. S. 402, 59 L. ed. 288, and the court misapplied the reasoning of the *Prentis* case. The decision is clearly contrary to the later decision of the Supreme Court of the United States in the Detroit case. It has never been followed or cited.

The principle that courts will not attempt by mandamus to require a lower court to do what is not within its jurisdiction to do, or attempt to control the jurisdiction of the lower court, is not applicable to the present case. Here, the interlocutory injunction having been denied, it became

the duty of the district court to hear the case on the merits, unless valid reasons for staying the action existed. Whether or not such reasons did exist is the subject of the inquiry in this case. And this inquiry is not answered by reference to the reasoning of the three-judge court, which, as we have shown, is not binding upon the district court.

Indeed, no question of the jurisdiction of the federal district court is involved. The suit is within the jurisdiction of that court and it is its duty to exercise it when properly called upon. (*Prendergast v. New York Telephone Co.*, U. S. Adv. Op. 1922-23, p. 516.) The only question is whether it is the duty of the court to exercise its jurisdiction in the present case and to proceed to the trial on the merits. And the final order of the Department of Public Works having been made, that question depends upon whether relief may be obtained from some *legislative action* of the state courts. In other words, before the district court is warranted in staying a suit within its jurisdiction upon grounds of "comity and convenience," *i.e.*, so that the company may exhaust the legislative remedies afforded by the state law, it must be able to point to some form of relief available under that law; and unless relief may be had from some

legislative action of the state courts, it is the duty of the district court to proceed with the cause in due course. It cannot suspend action by requiring the suitor to apply to the state authorities for relief without first determining that relief may be obtained from that source. It cannot abdicate its jurisdiction upon the mere surmise that relief is obtainable from a state court. It must find affirmatively that such relief may be had.

The three-judge court assumed that relief was obtainable in the state courts, and denied an interlocutory injunction. The district court, upon the same reasoning, likewise assumed that such relief might be obtained, and refused to proceed with the suit until the company had first applied to the state courts. Now counsel ask this court to make the same assumption and to deny us relief until we have applied to the state courts. We have clearly shown that there is no remedy in the state courts; at least no remedy that is legislative in its nature. And we submit that it is no answer to tell us that we have not applied for relief.

Either the state courts have legislative power or they have not. We may either obtain relief from some legislative act of those courts or we may not. But if it is clearly demonstrated that no such re-

lief is available, then it is the duty of the district court to exercise its jurisdiction of the suit without requiring us to do the futile act of applying to the state courts for relief they have no power to grant; especially where there is danger of the submission to the judicial power of the state courts and the consequent ousting of the federal jurisdiction. (*Detroit, etc. Co. v. Commission*, 235 U. S. 402, 59 L. ed. 288.)

The Petitioner Has No Other Remedy

We do not question the rule that mandamus will not be issued where there is other appropriate relief. That rule is elementary. We contend, however, that it is the duty of the district court to proceed with the case on the merits. If this contention is sound, mandamus is our only remedy. The order of the district court refusing to proceed is not a final order from which an appeal will lie. In order to gives this court appellate jurisdiction, the judgment or decree "must terminate the litigation on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but execute its judgment or decree it had already rendered. *Georgia Railway & Power Co. v. Decatur*, U. S. Adv. Op. 1922-23, p. 670-72.

It is suggested, however, that we have failed to comply with the requirement of the opinion of the three-judge court that we seek relief in the state courts as a condition to further action of the federal court. As above stated and pointed out in our opening brief, we cannot seek this stay without danger of foreclosing our right to relief in the federal courts.

It is suggested that although the time for appeal from the decision of the Department of Public Works has expired, the state courts may, nevertheless, entertain an appeal, and that we do not know that they will not until we have tried. Just what authority the state courts would possess to perform this act of grace is not pointed out. The suggestion, however, is completely answered by the language of the Supreme Court of the United States in *Prendergast v. New York Telephone Co.*, U. S. Adv. Op. 1922-23, p. 516, where it was contended that "comity and convenience" required an application for rehearing to the public service commission before resort to the state courts. The court there said (p. 518):

"It was not necessary that the company should apply to the commission for a rehearing before resorting to the court. While, under the Public Service Commission Law, any person interested in

an order of the commission has the right to apply for a rehearing, the commission is not required to grant such rehearing unless, in its judgment, sufficient reason therefor appear; the application for the rehearing does not excuse compliance with the order or its enforcement except as the commission may direct; and any change made in the original order upon the rehearing does not affect the enforcement of any right arising from the original order (§22). As the law does not require an application for rehearing to be made, and its granting is entirely within the discretion of the commission, we see no reason for requiring it to be made as a condition precedent to the bringing of a suit to enjoin the enforcement of the order." (Italics ours.)

The Writ of Mandamus Is Not Here Used as a Substitute for an Appeal or Writ of Error

We concede, of course, that the writ of mandamus cannot be used as a substitute for an appeal or writ of error. The answer to this division of respondent's brief is that we have no appeal from the order of the district court refusing to hear our motion to dismiss or require the respondents to answer. That order is not a final order from which an appeal would lie.

The Writ of Mandamus Is Necessary for the Appellate Jurisdiction of This Court

Respondent's argument on this point is fully answered on page 28 of the petitioner's opening brief. The Circuit Court of Appeals has an undoubted right to hear this cause on appeal from the *final* judgment on the merits either granting or denying a permanent injunction. Judge Cushman's refusal to proceed with the trial on the merits, which we have shown it is his duty to do, is an interference with the appellate jurisdiction of this court, and therefore, this court can issue its mandate in aid of its appellate jurisdiction.

The Writ Is Necessary for Petitioner's Relief

This mandamus is not sought to compel respondent to deny defendants' motion to dismiss; but to hear and decide that motion and to proceed with the cause. The mere fact that if the respondent district judge is ordered by this court to proceed with the cause, he will be obliged to pass on the motion to dismiss is no answer to petitioner's right to have the cause proceed on the merits. The motion to dismiss is a step in the proceeding on the merits, and of course cannot be reached until the

respondent is ordered to proceed with the cause. Petitioner is willing to meet that motion when the time arrives.

In the next place, decision by the Supreme Court of the United States on the temporary injunction will not render it "an idle and useless matter for the district court to proceed further with the cause." If the supreme court reverses the action of the three judges in granting the injunction, then the cause below, if the trial judge is now required to proceed, will have approached so much nearer to final judgment, a stage which this case eventually must reach regardless of the disposition of the application for temporary injunction. If the Supreme Court of the United States affirms the action of the three-judge court, but for reasons other than those advanced by the three judges, then petitioner is still entitled to have its case tried on the merits, and again the petitioner will be so much nearer final relief if the district judge is now required to proceed. And finally, if the Supreme Court of the United States affirms the action of the three judges for the same reasons advanced by them, then any proceedings, now taken by the district judge on the merits of the cause are not useless, because the supreme court, even if it should

deem the *Prentis* case applicable, would do no more than require the trial court, which concededly has jurisdiction, to hold the cause in abeyance at whatever stage the trial on the merits had reached, pending resort to the alleged state legislative remedies, following which, if they prove inadequate, the cause on the merits will proceed from the point where stayed.

Under the constitution, petitioner is entitled to a final judgment on the merits in the federal court and to have that point reached as speedily as possible. If the relief in the state courts is legislative, then, of course, petitioner has a right to proceed in the federal court at the conclusion of the legislative stage. If the relief in the State courts is judicial, then petitioner has the right to continue in the federal court now. But in either event, whether the action of the state court be legislative or judicial, petitioner at some time has the right to proceed with the present cause in the federal court. The only question is whether that continuation shall be now or later. And it must be apparent in answer to that question, that the further the cause is advanced in the federal court now, the better, so far as petitioner's ultimate and expeditious relief is concerned.

On page 27 of their brief, counsel say:

"This court cannot now review the *action* of the three judges, and their *decision* on this question is the law of the case unless reversed by the Supreme Court of the United States." (Italics ours.)

It is hardly necessary to repeat that petitioner is not trying in this court to review the *action* of the three judges in denying the interlocutory injunction. That matter has been appealed to the Supreme Court of the United States. Nor is the decision of the three judges "the law of the case" on the merits. The decision of the three judges is only the law of the case in so far as the denial of the interlocutory injunction is concerned, a matter entirely different and apart from the cause on the merits.

An Appeal From an Interlocutory Order Does Not Deprive Trial Court of Jurisdiction to Try the Case on Its Merits.

It is contended that we are not entitled to the relief asked for in this proceeding, because an appeal has been taken to the United States Supreme Court from the three-judge order of April 30th, denying an interlocutory injunction, and that thereby the trial court has lost jurisdiction.

No good reason can be assigned why a trial court should lose jurisdiction when an appeal has been taken, *not* from a *final* decree but from an interlocutory order. Not only so, but we assert that no authority can be found holding that in the absence of a statute so declaring, a trial court does lose jurisdiction over the merits of the cause when an appeal has been taken from an interlocutory order.

In Elliott on Appellate Procedure, § 542, the rule is laid down as follows:

"Where the law permits an appeal from an interlocutory judgment or an intermediate order, and the appeal is from such an order or judgment, only part of the case is removed by appeal from the trial court to the appellate tribunal. But the part of the case appealed goes completely to the higher court. If, for instance, an appeal is duly taken from an order appointing a receiver, only so much of the case as affects that order is carried out of the jurisdiction of the trial court, and, *as it retains jurisdiction of the principal issues, it may proceed to hear and determine them*, but it certainly could not hear or decide the branch of the case removed by the appeal to the higher court. If, to again illustrate, suit should be brought to foreclose a mortgage and for the appointment of a receiver, and the court should enter an interlocutory order appointing a receiver, a proper appeal would carry up the case so far as it involved the order, but it would leave the part of the case involved in the issue made upon

the mortgage in the trial court. It is quite clear, upon principle and authority, that what is effectively appealed leaves the jurisdiction of the one court and completely enters that of the other."

In *Guynn v. Newman*, 174 Ind. 161, 90 N. E. 759, it is said:

"After an interlocutory order appointing a receiver has been made, and such interlocutory order appealed from, the cause, notwithstanding the appeal, remains pending in the trial court, and amendments and changes in the pleadings may be made as in other cases."

See, also,

First National Bank v. Dutcher, 128 Ia. 413, 104 N. W. 497.

State ex rel. Sanglin v. Superior Court, 30 Wash. 232.

State ex rel. Anderson v. Superior Court, 36 Wash. 196.

Gorham v. Farson, 18 Ill. App. 520, 526.

Barton v. Long, 45 N. J. Eq. 161.

Ex parte Collins, 151 Fed. 358.

Wapello State Savings Bank v. Colton, 143 Iowa 359, 122 N. W. 149, 153.

Murphy v. Police Jury of St. Mary's Parish, 117 La. 355, 41 So. 647.

Barnum v. Barnum, 42 Md. 251, 294.

Doolittle v. American Nat. Bank of Omaha, 58 Neb. 454, 78 N. W. 926.

The cases cited by counsel for respondent in support of their contention, are clearly not in point. In *Keyser v. Farr*, 105 U. S. 265, an appeal from a *final* decree was taken, while in *Kendrick v. Roberts*, 214 Fed. 268, a writ of error to a *final* judgment was sued out. In such a case, jurisdiction of the trial court ceases. But we have not taken an appeal from a final decree, but only from an interlocutory order.

Nor is the case of *Jackson v. Cravens*, 238 Fed. 118, in point. The facts in that case were that an application for an interlocutory injunction was made to the three-judge court. The application was denied. The complainant then took an appeal to the United States Supreme Court from the order denying the interlocutory injunction, and another appeal from the same order to the Circuit Court of Appeals. These two appeals sought precisely the same relief.

In the case at bar, the appeal to the United States Supreme Court and this proceeding are not even in effect appeals from the same order, nor are the appeal and this proceeding designed to secure the same or even substantially the same relief.

Again we say that by the appeal we seek to secure, in due time, an injunction effective until final

decree. By this proceeding we seek to compel the district judge to act, which action in due time will cause and lead to the entry of a final decree establishing the rights of the parties to the suit commenced on April 24th.

In *Jackson v. Cravens*, 238 Fed. 118, the sole purpose of the two appeals was to obtain relief *pendente lite*. That was also the sole purpose in the case of *Cumberland Tel. & Tel. Co. v. Louisiana Public Service Com.*, 43 Sup. Ct. Rep. 75, and *Jacksonville Gas Co. v. City of Jacksonville*, 268 Fed. 404. But by this proceeding we seek no relief *pendente lite*. All we ask is that the trial judge should take such action as will result in due time in a final decree.

No Stay Possible in State Court.

If we understand aright the position of counsel for respondent, it is that we should have applied, in the case brought by the City of Seattle in the Thurston County court, for a stay, and that we should have brought an independent proceeding to review the valuation finding of the department and in that proceeding also apply for a stay.

Why two applications should be made is not readily perceived. Moreover, we think it plain that

if we brought a proceeding to review the valuation finding in the state court the proceeding would have to be confined to a consideration of that finding and not to a consideration of the order of March 31, 1923.

But how can a finding be stayed? Obviously the stay to be applied for is a stay of the enforcement of the *order* of March 31st. It is the enforcement of that order which confiscates the company's property, not the making of the valuation finding.

Now there are two, and only two, possible sources from which the state court can derive the power to grant a stay of the enforcement of the order, one given by statute, one existing by virtue of its inherent judicial power.

But the statute, section 10429 Rem. Com. Stat., expressly provides that the state court can *not* grant a stay. It is not denied by counsel for respondent that the statute so provides, but it is suggested by them that "it is for the state courts to construe the statute," and that the state supreme court may hold such statute unconstitutional "or for other reasons permit a stay." (Resp. brief, p. 36.)

But the brief of respondent is barren of even a hint that the statute can be construed in any way

other than denying to the state court the power to grant a stay. The reason for this is perfectly clear. The statute is plain and unambiguous—"*no supersedeas shall be allowed* in any case from such order pending the final determination of the cause in the superior court, or if appealed to the supreme court, by such supreme court."

Is the statute unconstitutional? There is no argument in the brief of respondent that it is unconstitutional. No reason is assigned as to why it should be held unconstitutional. We can conceive of no reason why the statute should be held invalid. Moreover, how can the question as to whether the statute is valid or not arise? We believe, and have so asserted, that the statute absolutely deprives the state court of the power to grant a stay, and that the statute is valid. On what theory then can we ask the state court for a stay? Are we to go into a court of justice and with a lie on our lips ask the court to grant to us a relief which we believe the court has not the power to give?

The situation presented is certainly a curious one to say the least. We have brought a suit in the federal court, as we had a right to do. As a condition of securing a trial in that court, we are told that we must apply to another court for a relief

which that court is forbidden to grant, but which our adversary, without giving any reasons therefor, suggests may be granted to us if we contend for that which we believe to be untrue, namely, that the statute is unconstitutional.

And may we not ask what counsel for respondent would do if we followed the course suggested by them? Would they say to the state court that the statute is unconstitutional?

It is also argued that the state court "for other reasons might permit a stay."

What other reasons?

The only possible "other reason" is that the state court might grant a stay in the exercise of its inherent judicial power. We doubt the existence of the power in this case, but we need not argue that proposition for it is immaterial whether the power exists or not. If it does not exist, there is an end to the argument. If the power does exist, the only court which can exercise it is a court acting in a judicial capacity. But the state court in the independent proceeding which it is asserted we should bring to review the valuation finding, will act according to the theory of respondent in a *legislative* capacity. So acting, no stay could be granted in that proceeding. And here we may say that to

require us to bring an independent proceeding to review the valuation finding in the state court requires us to do an absolutely absurd thing. We assert that the statute which provides that the state court can act in a legislative capacity in reviewing a valuation finding, is unconstitutional. But if we institute a proceeding to review the valuation finding, we must institute it by virtue of the provisions of the very section of the statute which we believe to be unconstitutional. But just how can one comply with the provisions of a statute, seek relief under the statute and at the same time assert that the statute is wholly void?

In the case already brought by the city of Seattle in the Thurston County court, the court is reviewing the rate order of March 31, 1923. It cannot review in that case the valuation finding, as the city of Seattle is not permitted to seek a review of a valuation finding.

Everett v. Department of Public Works, 25 Wash. Dec. 357.

The court in that case must then act in a purely judicial capacity. Now, if we apply in that case to a court acting in a purely judicial capacity to grant a stay, surely we have invoked the judicial power of the state court. But if we invoke the

power of the state court will not its final judgment be binding upon us? Can we take the position that we are in that case for one purpose and out of it for all other purposes? On this phase of the case the decision in the case of *Detroit & Mackinac R. Co. v. Michigan Railroad Comm.*, 235 U. S. 402, is squarely in point. There the regulatory body made an order fixing rates. The utility, as it is argued we should do, sought relief in the state courts. Relief was there denied. The utility applied to the United States Supreme Court for the allowance of an appeal or writ of error. *Its application was denied.* It then brought suit in the United States District Court and applied for an interlocutory injunction. The three-judge court held that the utility was concluded by the judgment of the Michigan state court and the United States Supreme Court affirmed the three-judge decree.

The Imposition of Legislative Functions Upon State Courts

Practically no attempt is made to answer our contention that section 10441, Rem. Comp. Stat., is unconstitutional in that it purports to impose upon the state courts of Washington a legislative duty or function.

It is, however, said that the Supreme Court of the State of Washington *assumed*, in the case of *Everett v. Department of Public Works*, vol. 25, Wash. Dec. p. 357, that the statute was valid. But it will not be pretended that *any* question as to the constitutionality of that section arose or was discussed in that case.

The only questions involved in that case were, first, whether the city of Everett had instituted review proceedings in the court of the proper county, and, second, whether the city of Everett could review a valuation finding of the Department of Public Works.

Moreover, it is familiar law that a court will not examine into the validity of a statute unless necessary so to do. Nor does the fact that a court has been called upon to construe a statute amount to even an assumption that the court deems the statute constitutional.

Ireland v. Palestine etc. Turnpike Co., 19 Ohio St. 367, 373.

Kansas City M. & B. R. Co. v. Whitehead, 109 Atl. 495, 19 So. 705, 707.

State ex rel. Wine v. Keokuk & W. R. Co., 99 Mo. 30, 12 S. W. 290, 293.

Davison v. Chicago & N. W. Ry., 100 Neb. 462, 160 N. W. 877.

In addition to the cases cited on pages 14, 16, 17 and 18 of our opening brief, holding that legislative power can not, under the constitution of the State of Washington, be vested in the courts of that state, we call particular attention to the decision in the case of *Detroit & Mackinac Ry. v. Michigan R. R. Comm.*, 235 U. S. 402. It there appears that the Supreme Court of the State of Michigan had held "that the duty of the courts [of that state] is not essentially different from that of the Commission." Despite this statement, the United States Supreme Court held that legislative power could not constitutionally be given to Michigan state courts. The court said, "that in the absence of a *clear* decision by the supreme court, we should not believe that the legislature attempted to grant or could grant such powers to the courts of Michigan." (235 U. S. 405.)

Now, there certainly is no clear decision of the Supreme Court of the State of Washington holding that a legislative function can be imposed upon the state courts of Washington. On the contrary, there are decisions holding clearly and unmistakably that legislative power can not be vested in Washington state courts.

Territory ex rel. Kelley v. Stewart, 1 Wash. 98, 110.

Spokane v. Spokane & Inland Empire R. Co., 75 Wash. 651, 659.

State ex rel. Seattle v. Public Service Commission, 76 Wash. 492, 500.

In re Bruen, 102 Wash. 472.

State ex rel O. R. & N. Co. v. Commission, 52 Wash. 17, 26, 32.

Selde v. Lincoln County, 25 Wash. 198, 206.

No court has ever held that the legislative function of determining value or fixing rates can be imposed upon the courts of a state unless the constitution of that state has so declared.

The Difference of Opinion Between the Department and the Company as to Value, is Purely a Judicial Question

We said in our opening brief that the United States Supreme Court had decided *time and time again* that the value of the property of a public utility was to be determined as of the date when an inquiry regarding rates was made; that section 10441, Rem. Comp. Stat., as construed by the Supreme Court of the State of Washington in the case of *State ex rel. Spokane Gas Co. v. Kuykendall*, 119 Wash. 107, precluded such a method of determining value if the property had once been valued;

that this difference as to the rule for determining value was the sole difference as to value between the company and the Departmnt of Public Works; and that, consequently, if the company went into the state courts of Washington the question before such courts would be purely a judicial question.

What answer is made to this proposition? It is said that the case of *State ex rel. Spokane Gas Co. v. Kuykendall*, was decided prior to the rendition of the opinions in the *Missouri Telephone Company* case, 43 Sup. Ct. Rep. 544, and the *Bluefield Water Works* case, 43 Sup. Ct. Rep. 675, and that the Washington Supreme Court would *now* follow these two decisions of the United States Supreme Court. But the two decisions of the United States Supreme Court just mentioned announced no new rule of law. They do but re-affirm that which was said in *Willcox v. Consolidated Gas Company, The Minnesota Rate Cases*, and several other cases decided by the United States Supreme Court both before and after the decision in the *Willcox* case. All these decisions were called to the attention of the Washington Supreme Court in the *Spokane Gas Company* case. Not only so, but the court quoted from the syllabus of the *Willcox* case the rule relative to value, and *then refused to follow it.* On what theory is it now

asserted that the court will reverse its former holding?

Nature of Final Act Determines Nature of Previous Inquiry.

In the *Prentis* case, 211 U. S. 217, the court declared that the test by which it was to be determined whether a court was acting judicially or non-judicially was that "the nature of the final act determines the nature of the previous inquiry."

Now, the order which gives rise to this entire controversy is a rate order. It is that order which confiscates the company's property. If the state court on review of that order *cannot* change the rates established by the department, then the court under all authority will act in a judicial capacity.

The answer made to this proposition, if we understand counsel's argument aright, is that the state court can "at least indirectly change rates prescribed by the department," and that the court since it has such power must act in a legislative capacity. If this is not their position, what is meant by the statement just quoted and the further statement "that fixing value and making rates are practically the same?" But we have already shown that the

state courts of Washington cannot have imposed upon them any legislative powers or duties.

Company Entitled to Relief Even if Legislative Process Incomplete.

We have previously pointed out that where the utility is daily suffering confiscation, it may resort for relief to the United States courts even though the legislative process is not complete.

Counsel seek to turn the case of *Oklahoma Natural Gas Co. v. Russell*, U. S. Adv. Ops. 1922-1923, p. 395, against us by calling attention to the fact that in that case the utility did apply for relief in the state court before filing its bill in the United States court. That case, however, cannot be so distinguished. The Oklahoma statute *expressly* gave to the state courts *the power to grant a stay.* But the Washington statute expressly *denies* to the state court the power to grant a stay. The utility in the *Oklahoma* case had done all it could under the state law to get relief and could not get it, but so has the company in the case at bar.

In the *Oklahoma* case the state court had the power to grant a stay; hence, the utility had a clear legal right to apply therefor. In this case, the pow-

er to grant a stay has been expressly withheld from the state court; hence, the utility has no right to apply therefor.

The Writ Should Issue.

Finally, it is argued that mandamus will not lie because the trial court did not stay *permanently* the action instituted on April 24th, but stayed it only until certain conditions precedent had been performed by the company. Elsewhere it is said that the action has been "only postponed for good reasons." But if the conditions precedent are conditions impossible to be performed by the company, the stay would seem to be a permanent one. We admit that a judge has the right and power to postpone a trial for good reasons; but the question here is, are the reasons assigned good reasons?

The trial judge has refused to act until we have applied for a stay in the state courts, but the statute expressly denies to the state courts the power to grant a stay. Is that reason a *good* one?

The trial judge has held that legislative powers have been imposed upon the state courts of Washington. The Washington supreme court has held that such powers cannot constitutionally be im-

posed upon it. Is the trial judge's reason then a *good* one?

It is urged, however, that the three-judge court gave the same reasons for its action that the trial judge gave for his action, and that consequently the trial judge's reasons must be good reasons.

But the three-judge court had only the power to grant or withhold relief *pendente lite*, while the trial judge had no such power and was not requested to exercise any such power.

The reasons given by the three-judge court for its action may have been good or bad; with them we are not now concerned. But because the reasons assigned by one tribunal for determining a certain question in a particular way may be good, it does not follow that the same reasons may justify the action of another tribunal in determining an entirely different question.

Judge Cushman took a certain action. He has assigned certain reasons for that action. The sole question here is, are these reasons good or bad. If his reasons are good ones, the writ should not issue; if they are not good ones, the writ should issue.

Respectfully submitted,

OTTO B. RUPP,
POST, RUSSELL & HIGGINS,
PILLSBURY, MADISON & SUTRO,
Solicitors for Petitioner.

W. V. TANNER,
Of Counsel.